

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

March 23, 2004

IN RE:

COMPLAINT OF CITIZENS
TELECOMMUNICATIONS COMPANY
OF TENNESSEE, LLC AGAINST BEN
LOMAND COMMUNICATIONS, INC.

DOCKET NO.
03-00331

ORDER DENYING MOTION TO DISMISS

This matter is before the Hearing Officer for consideration of the *Amended Answer and Motion to Dismiss of Ben Lomand Communications, Inc* ("Motion to Dismiss") filed on September 4, 2003 by Ben Lomand Communications, Inc. ("Ben Lomand").

I. Travel of the Case

On May 9, 2003 Citizens Telecommunications Company of Tennessee, LLC d/b/a Frontier Communications of Tennessee ("Frontier") filed its *Complaint* alleging that Ben Lomand "has illegally offered special promotions to individuals and/or business customers in Sparta and McMinnville without filing such promotions with the Tennessee Regulatory Authority" and "wrongfully utilized drop wire, house cabling on the network side of the interface point, and entrance cabling owned by [Frontier] to provide service to former [Frontier] customers that it has taken away from [Frontier]."¹ The *Answer and Motion to Dismiss of Ben Lomand Communications, Inc.* ("Answer") was filed on June 11, 2003. In the *Answer* Ben Lomand denied that it has offered unauthorized special promotions or misappropriated Frontier's property. Ben

¹ *Complaint*, p 1 (May 9, 2003).

Lomand also stated in its *Answer* that Frontier has failed to state a cause of action or a claim upon which relief may be granted and that Frontier has failed to provide sufficient facts in its *Complaint* to support the allegations contained in the *Complaint*.² Ben Lomand concluded its *Answer* with a request that the Authority decline to convene a contested case and dismiss the *Complaint*.³

On July 3, 2003 Authority Staff filed a data request asking Frontier to provide: “specific examples, including customer names, of non-tariffed special promotions offered to customers and potential customers in the Sparta and McMinnville areas” and “specific examples of situations where, without permission, [Ben Lomand] used [Frontier’s] drop wire and cabling to provide service to a customer” including dates, locations and customer names as well as steps taken by the parties to remedy the situation.⁴ Frontier filed responses to the data request on July 14, 2003 (“*Responses*”). These *Responses* include the following statements:

Attached are examples of subsequent special promotions (Exhibit 2) offered by Ben Lomand. Although the examples are not specific to McMinnville or Sparta, our employees determined through calls to [Ben Lomand’s] business office that these promotions were, in fact, extended to [Ben Lomand] customers in McMinnville and Sparta. Those employees have signed affidavits (Exhibit 3) attesting to the fact that this information was relayed to them by [Ben Lomand] customer contact representatives on more than one occasion.

It was not until after [Frontier] filed its complaint on 5/8/03, against [Ben Lomand] that [Ben Lomand] filed a “Summer Waiver 2003 Program Promotion” request with the TRA to become effective 7/1/03 under tariff number 2003696 (Exhibit 4). Citizens has reason to believe this is [Ben Lomand’s] first special promotion filing at the TRA since it entered the McMinnville/Sparta market even though it has offered numerous and ongoing special promotions to customers.

[Ben Lomand’s] failure to comply with TRA requirements has resulted in a distinct competitive disadvantage to Citizens. Each special promotion offered by [Frontier] was filed with the TRA giving [Ben Lomand] 30 days advance notice that we were offering a

² *Answer*, pp. 3-8 (June 11, 2003)

³ *Id.* at 8

⁴ Letter from Joe Werner, Telecommunications Chief, Tennessee Regulatory Authority to Mr. Guilford F. Thornton, Jr. of July 2, 2003 (July 3, 2003)

special promotion. However, [Ben Lomand] engaged in offering special promotions without [Frontier] having the same advance notice or the TRA having knowledge of the promotion.

Frontier also attached as Exhibit 7 to its *Responses* photographs purporting to show Frontier telephone cables that have been cut and redirected into Ben Lomand terminals. Exhibit 7 also contained photographs purporting to show Ben Lomand jumpers connected to Frontier 66E blocks.⁵

On September 4, 2003 Ben Lomand filed its *Motion to Dismiss*. The *Motion to Dismiss* incorporated Ben Lomand's previously-filed *Answer* and added an affirmative defense alleging that Frontier "does not have standing to propound its claim that Ben Lomand failed to file special promotions."⁶ Frontier filed its *Response to Amended Motion to Dismiss* on September 5, 2003.

On September 8, 2003, the voting panel assigned to this docket unanimously appointed the General Counsel of the Authority or his designee to act as Hearing Officer in this matter and to render an initial decision on the merits of the *Complaint*.

II. Issues Presented for Decision

Ben Lomand's *Answer* together with its *Motion to Dismiss* present the following issues: whether Frontier's allegations that Ben Lomand has offered special promotions in violation of TRA Rules and state law and that Ben Lomand has wrongfully used and misappropriated Frontier's drop wire and house cabling fail to state a cause of action or a claim upon which relief may be granted; whether Frontier has failed to provide sufficient facts in its *Complaint* and *Responses* to support the allegations contained therein; and whether Frontier has standing to prosecute its *Complaint* regarding allegations that Ben Lomand has violated Authority rules for the filing of tariffs.

⁵ *Responses*, Exhibit 6 (July 14, 2003)

⁶ *Motion to Dismiss*, p. 2 (September 4, 2003)

III. Positions of the Parties

A. Ben Lomand

- 1. Whether Frontier's allegations that Ben Lomand has offered special promotions in violation of TRA Rules and state law and that Ben Lomand has wrongfully used and misappropriated Frontier's drop wire and house cabling fail to state a cause of action or a claim upon which relief may be granted.**

a) Ben Lomand's *Answer*

Ben Lomand's *Answer* asks that the allegations that Ben Lomand has offered special promotions without following legal requirements and has misappropriated Frontier's property be dismissed for failure to state a cause of action or a claim upon which relief may be granted.⁷ Ben Lomand denies the allegation that it has failed to comply with tariff requirements under state law and Authority rules⁸ and the related allegation that, through the offering of special promotions in violation of state law and Authority rules, it is engaging in anti-competitive practices.⁹ Ben Lomand states that "what is alleged here is the violation of tariff filing rules and Tenn. Code Ann. § 65-4-122 which prohibits unjustly discriminatory and/or preferential rates . . . the lack of such filing would not be anti-competitive. The only law violated would be the filing requirement of Tenn. Code Ann. § 65-4-122 and TRA rules, not anti-competition laws."¹⁰ Ben Lomand further answers the allegations regarding anti-competitive practices stating that the *Complaint* is defective in that it omits a citation to the statute regarding anti-competitive practices found at Tenn. Code Ann. § 65-5-208(c) and that "anti-competitive practices are generally related to predatory pricing, price squeezing, and price discrimination" none of which have been alleged in the *Complaint*.¹¹

⁷ *Answer*, pp 7-8 (June 11, 2003)

⁸ *Id.* at 4.

⁹ *Id.* at 3-7.

¹⁰ *Id.* at 4.

¹¹ *Id.*

Ben Lomand also denies the allegations of unlawful trespass, conversion, unfair competition, violations of Tenn. Code Ann. § 65-5-110, the allegation that it continues to use Frontier's property to service its customers,¹² and the related allegation that it has intentionally damaged Frontier's facilities.¹³ Ben Lomand states that "other than reference to a date (March 14, 2002), [Frontier] does not specify what acts it is alleging are wrongful" and therefore "fails to state a cause of action."¹⁴

Ben Lomand also states that Frontier filed the *Complaint* in response to a complaint filed by Ben Lomand against Frontier which is presently pending in Docket No. 02-01221. In support of this allegation Ben Lomand states that Frontier "alleges an act that occurred more than one year (March 14, 2002) before the complaint was filed" and asks "why wait until Ben Lomand filed a complaint?"¹⁵

b) Ben Lomand's *Motion to Dismiss*

Ben Lomand states that its *Motion to Dismiss* was filed to address certain issues in Frontier's *Responses* to the Authority Staff's data request.¹⁶ Ben Lomand also stated that the *Motion to Dismiss* incorporates Ben Lomand's previously-filed *Answer* in its entirety.¹⁷ Ben Lomand references "several advertisements for telephone services which are attached to [Frontier's *Response*] as Exhibit 2" and states that "all, except three (3) are Ben Lomand Co-Op, Inc. advertisements not Ben Lomand Communications, Inc. advertisements." Ben Lomand addresses the issue of wrongful use and misappropriation of Frontier's property stating that "Ben Lomand is of the opinion that any concerns of [Frontier] with respect to this issue were settled since, as

¹² *Answer*, p. 6 (June 11, 2003)

¹³ *Id.* at 5.

¹⁴ *Id.* at 5-6

¹⁵ *Id.* at 6

¹⁶ *Motion to Dismiss*, p 1 (September 4, 2003)

¹⁷ *Id.* at 2.

set forth in Ben Lomand's original Answer and Motion to Dismiss, communications occurred more than a year ago regarding these issues and no further communications were had until the filing of the complaint in this matter."¹⁸ Ben Lomand addresses this issue further stating "Ben Lomand would state that it believes that it has installed its own wiring at the proper point" and that because Frontier "has not charged the Three Star Mall for any inside wiring" it can not "claim that Ben Lomand has been using [Frontier's] wiring."¹⁹

2. Whether Frontier has failed to provide sufficient facts in its *Complaint* and *Responses* to support the allegations contained therein.

a) Ben Lomand's *Answer*

In its *Answer* Ben Lomand cites TRA Rule 1220-1-2-.09(1)(c) and TRA Rule 1220-1-2-.09(e)²⁰ and moves that Frontier be required to provide a more definite statement of the facts and circumstances regarding most of the allegations contained in its *Complaint*.²¹ Ben Lomand states that Frontier failed to provide sufficient facts in its *Complaint* to support the allegation that it has offered special promotions in violation of state law and Authority rules and has thus prevented Ben Lomand from further responding to these allegations.²² Regarding the allegations of misuse of Frontier's property Ben Lomand states that it has installed its own property to service its customers and that there is "difficulty inherent in denoting the demarcation or customer interface point which was installed at one customer premises, the Three Star Mall" and that "due to the lack of specificity in the complaint, Ben Lomand is unsure whether this is the location which is

¹⁸ *Motion to Dismiss*, p 4 (September 4, 2003)

¹⁹ *Id* at 4

²⁰ TRA Rule 1220-1-2 09(1)(c) states "A formal complaint filed against a public utility regulated by the Authority shall set forth with specificity the factual basis and legal grounds upon which the complaint is based TRA Rule 1220-1-2 09(1)(e) states "A formal complaint filed against a public utility regulated by the Authority shall enumerate any Authority rule or regulation relied upon for a claim and set forth the manner of each alleged violation of that Authority rule or regulation "

²¹ *Answer*, p 8 (June 11, 2003)

²² *Id* at 3-4

the subject of this complaint.”²³ Ben Lomand also points to a copy of a letter attached to its *Answer* as Exhibit 2 “stating that Ben Lomand was addressing the perceived complaints and asked for any further communications from [Frontier] if [Frontier’s] allegations and claims had not been addressed.”²⁴ Ben Lomand also alleges that Frontier “has cut over the drop wire, cut off Ben Lomand’s property, including cable, to service [Frontier’s] own customers.”²⁵

b) Ben Lomand’s *Motion to Dismiss*

Ben Lomand states in its *Motion to Dismiss* that the photographs submitted with Frontier’s *Responses* which purport “to show wrongful use and misappropriation of [Frontier’s] drop wire and house cabling” are assumed by Ben Lomand to be photographs of a local mall but are not labeled or otherwise clear and distinct enough to allow Ben Lomand to fully answer Frontier’s allegations.²⁶ Ben Lomand states further that if its assumptions are correct in this regard “it believes that it has installed its own wiring at the proper point.”²⁷

3. Whether Frontier has standing to prosecute its *Complaint* regarding allegations that Ben Lomand has violated Authority rules for the filing of tariffs.

In its *Motion to Dismiss* Ben Lomand raises the issue of standing and points to the Authority’s Order issued June 26, 2003 in Docket 02-00562 which states that, to establish standing, a party must demonstrate (1) that it sustained a distinct and palpable injury; (2) the injury was caused by the challenged conduct; and (3) the injury may be redressed by a remedy

²³ *Answer*, pp 6-7 (June 11, 2003).

²⁴ *Id* at 5

²⁵ *Id* at 7

²⁶ *Motion to Dismiss*, p. 4 (September 4, 2003)

²⁷ *Id.* at 4

the forum is authorized to provide.²⁸ Ben Lomand states that Frontier fails this test in that it “alleges no distinct and palpable injury arising from Ben Lomand’s alleged failure to file specified tariffs.”²⁹ Ben Lomand also states that Tenn. Code Ann. § 65-4-120 does not contemplate a private cause of action.³⁰ Ben Lomand states that based on the foregoing, Frontier “lacks standing to propound its claim that Ben Lomand failed to file the appropriate tariffs.”³¹

B. Frontier

1. Whether Frontier’s allegations that Ben Lomand has offered special promotions in violation of TRA Rules and state law and that Ben Lomand has wrongfully used and misappropriated Frontier’s drop wire and house cabling fail to state a cause of action or a claim upon which relief may be granted.

In its *Response to Amended Motion to Dismiss* Frontier states that “based on the statutes cited by [Frontier] the injuries to [Frontier] can be redressed by a remedy the Authority is authorized to provide.”³² Frontier points to the reference to Tenn. Code Ann. § 65-4-117(1) in its *Complaint* stating that “the Authority has the power to ‘investigate . . . upon complaints any matter concerning a public utility.’”³³ Frontier also points to the reference to Tenn. Code Ann. § 65-5-208(c) stating that “the Authority ‘shall, as appropriate . . . adopt other rules or issue orders to prohibit . . . anti-competitive practices.’”³⁴ Frontier states that “although T.C.A. § 65-4-120, by itself, may not support a private cause of action, it does allow the Authority to fine the

²⁸ *Motion to Dismiss*, p 2 (September 4, 2003) The Motion to Dismiss cites *In Re Complaint of US LEC of Tennessee, Inc Against Electric Power Board of Chattanooga*, Docket No 02-00562, *Order on the Motion for Summary Judgment of the Electric Power Board of Chattanooga*, 14-15 (June 26, 2003) which in turn cites *Metropolitan Air Research Testing Auth, Inc v Metropolitan Gov’t of Nashville and Davidson County*, 842 S.W.2d 611, 615 (Tenn Ct App. 1992), *Adarand Constructors v Mineta*, 534 U.S. 103, 107, 122 S.Ct 511, 513, 151 L Ed 2d 489 (2000) (standing may be raised *sua sponte*), *Citizens for a better Environment v Steel Co*, 523 U.S. 83, 87, 118 S.Ct. 1003, 1010, 140 L.Ed.2d 210 (1998)(same)

²⁹ *Id.* at 3

³⁰ *Id.*

³¹ *Id.*

³² *Response to Amended Motion to Dismiss*, p 3 (September 5, 2003)

³³ *Id.* at 2

³⁴ *Id.*

offending party.”³⁵ Frontier states further that “if [Ben Lomand’s] argument were correct, then the only parties who could file a TRA complaint would be those parties who would not have to file a TRA complaint because they would already have a private right of action. Moreover, in its request for relief, [Frontier] has asked that the Authority exercise its enforcement rights against [Ben Lomand]. Clearly that is an appropriate request.”³⁶

Frontier points to statements in its *Complaint* that Ben Lomand “is without contractual, written or oral permission from [Frontier], using [sic] the drop wire, house cabling on the network side of the customer interface point, and entrance cabling owned by [Frontier] to provide service to [Frontier’s] former customers that [Ben Lomand] has taken from [Frontier]” and that “for purpose of a motion to dismiss, this allegation must be taken as true.”³⁷

2. Whether Frontier has failed to provide sufficient facts in its *Complaint* and *Responses* to support the allegations contained therein.

Regarding facts related to the allegations that Ben Lomand has offered special promotions in violation of TRA Rules and state law Frontier states that it has “cited numerous examples of instances where [Ben Lomand] offered special promotions without filing Tariffs” and offers the example of Data Response No. 1 which purports to be a mailing from Ben Lomand to Frontier’s customers delivered in early 2000 which included the statement “There will be No Charge to change to us or to add a new line at this time.”³⁸ Frontier states that this “mailing implies that all related installation charges were being waived. However, there does not appear to be any corresponding tariff on file with the TRA.”³⁹ Frontier states further that it has attached affidavits of its employees attesting to specific examples of instances where Frontier alleges that Ben

³⁵ *Response to Amended Motion to Dismiss*, p. 3 (September 5, 2003)

³⁶ *Id*

³⁷ *Id*

³⁸ *Id* at 4

³⁹ *Id*.

Lomand has utilized the promotional material of Ben Lomand Rural Telephone Cooperative, Inc. for its own purposes without filing a promotional tariff.⁴⁰

Regarding facts related to the allegations that Ben Lomand has wrongfully used and misappropriated Frontier's drop wire and house cabling Frontier states that it has "provided examples by way of photographs to show specific locations where [Ben Lomand] has engaged in this unlawful activity."⁴¹

3. Whether Frontier has standing to prosecute its *Complaint* regarding allegations that Ben Lomand has violated Authority rules for the filing of tariffs.

Frontier states that "given the fact that [Frontier] and [Ben Lomand] are engaged in fierce competition, the relief requested by [Frontier] falls within the zone of interest to be protected by the statutes cited by" Frontier.⁴² Regarding the issue of whether Frontier has claimed an injury arising from Ben Lomand's alleged failure to file specified tariffs Frontier points to the language in its *Complaint* alleging that Ben Lomand has increased its business in Sparta and McMinnville more than 71% and states that since Frontier and Ben Lomand are the competitors in these markets "it follows that [Ben Lomand's] increase in business has been to the detriment of [Frontier], and [Frontier] has lost business."⁴³ Frontier also states that Ben Lomand's "misappropriation of [Frontier's] drop wiring is a clear injury to" Frontier.⁴⁴

IV. Discussion and Analysis

This matter is before the Hearing Officer on a motion to dismiss. Under Tennessee law, a "motion to dismiss for failure to state a claim upon which relief can be granted tests only the

⁴⁰ *Response to Amended Motion to Dismiss*, p. 4 (September 5, 2003)

⁴¹ *Id.* at 5.

⁴² *Id.* at 2.

⁴³ *Id.* at 3.

⁴⁴ *Id.*

legal sufficiency of the complaint, not the strength of a plaintiff's proof."⁴⁵ A motion to dismiss "admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action as a matter of law."⁴⁶ Moreover, in ruling on a motion to dismiss, "courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true."⁴⁷ Finally, a motion to dismiss should be denied "unless it appears that the plaintiff can prove no set of facts in support of [its] claim that would entitle [it] to relief."⁴⁸ These legal principles establish the guidelines for resolving the *Motion to Dismiss*.

Ben Lomand's request that the Authority decline to convene a contested case has already been denied by virtue of the Authority's *Order Convening a Contested Case Proceeding and Appointing a Hearing Officer* issued on October 13, 2003. The following discussion addresses the remainder of the issues presented by Ben Lomand's *Motion to Dismiss*.

A. Whether Frontier's allegations that Ben Lomand has offered special promotions in violation of TRA Rules and state law and that Ben Lomand has wrongfully used and misappropriated Frontier's drop wire and house cabling fail to state a cause of action or a claim upon which relief may be granted.

Pursuant to Tenn. Code Ann. § 65-5-202 the Authority may require public utilities "to file with it complete schedules of every classification employed and of every individual or joint rate, too, fare, or charge made or exacted by it for any product supplied or service rendered within this state as specified in such requirement."⁴⁹ TRA Rule 1220-4-8-.07 requires competing telecommunications service providers providing local service to file informational tariffs describing all offered services.⁵⁰ Pursuant to Tenn. Code Ann. § 65-5-210 the Authority has original jurisdiction to "resolve all contested issues of fact or law arising under the application of

⁴⁵ *Bell v Icard*, 986 S.W 2d 550, 554 (Tenn. 1999)

⁴⁶ *Id*

⁴⁷ *Id*

⁴⁸ *Stein v Davidson Hotel Co*, 945 S W 2d 714, 716 (Tenn. 1997)

⁴⁹ Tenn Code Ann § 65-5-202

⁵⁰ Tenn. Comp R & Regs 1220-4-8-.07

Acts 1995, ch. 408” through “appropriate orders.”⁵¹ Among these “appropriate orders” are orders to prohibit anti-competitive practices.⁵² Frontier has alleged that Ben Lomand has engaged in anti-competitive practices to the extent that it has offered special promotions in violation of TRA Rules and state law and that Frontier has suffered injury by not receiving notice of such promotions in a timely manner and has thus been prevented from reacting to the special promotions. Frontier alleges that this situation has ultimately resulted in the loss of customers to Ben Lomand in an anti-competitive manner.⁵³

Ben Lomand states that it considers the issue of wrongful use and misappropriation of Frontier’s property “settled” because the parties had not communicated regarding this issue for more than a year at the time of the filing of Ben Lomand’s *Motion to Dismiss*.⁵⁴ Ben Lomand states further that, to the best of its information and belief, Frontier has not charged for the inside wiring in dispute and that it therefore cannot claim that Ben Lomand has been using Frontier’s wiring. Whether Frontier has collected money for use of what it claims is its property is irrelevant to the issue of whether the material in question has allegedly been misappropriated or otherwise used by Ben Lomand in an allegedly unlawful manner. Likewise, the fact that the parties have not communicated with regard to the issue of wrongful use or misappropriation of Frontier’s property is simply not a proper basis for dismissing the *Complaint*—Ben Lomand acknowledges in its *Answer* that unauthorized use of another’s property is potentially a violation of Tenn. Code Ann. §§ 65-21-110 and 65-35-102.⁵⁵

⁵¹ Tenn. Code Ann. § 65-5-210(a)

⁵² See Tenn. Code Ann. § 65-5-208(c)

⁵³ See *Complaint*, pp. 1, 4 (May 9, 2003). See also *Responses*, p. 2 (July 14, 2003) and *Response to Amended Motion to Dismiss*, pp. 2-3 (September 5, 2003).

⁵⁴ *Motion to Dismiss*, p. 4 (September 4, 2003).

⁵⁵ *Answer*, p. 7 (June 11, 2003)

TRA Rule 1220-1-2-.09(1)(d) requires that a complaint enumerate each statute allegedly violated and state each fact demonstrating a violation of the statute. Ben Lomand states that the *Complaint* is defective regarding the allegations of anti-competitive practices because it fails to cite the statute regarding anti-competitive practices, Tenn. Code Ann. § 65-5-208(c).⁵⁶ Contrary to Ben Lomand's statement, Frontier states on the first page of its *Complaint* that the Complaint was filed "pursuant to T.C.A. § 65-4-117(1) and T.C.A. § 65-5-208(c)" and provides footnotes explaining each of these statutes and again providing the specific citation for each.

Based on the foregoing, the Hearing Officer finds that Frontier has stated a cause of action and a claim upon which relief may be granted regarding the allegations that Ben Lomand has offered special promotions in violation of TRA Rules and state law and that Ben Lomand has wrongfully used and misappropriated Frontier's drop wire and house cabling.

B. Whether Frontier has failed to provide sufficient facts in its *Complaint* and *Responses* to support the allegations contained therein.

Frontier has offered numerous specific examples of promotions it alleges Ben Lomand has offered to potential customers without following applicable tariffing requirements. Ben Lomand responds only that most of the examples offered do not apply to them. Ben Lomand does not point to a lack of specificity in this regard. Rather, it simply takes the position that the specifics provided do not pertain to Ben Lomand. Frontier has offered in its *Complaint* and *Responses* specific allegations which, must be construed liberally in favor of the complainant and taken as true in the context of a motion to dismiss.

Frontier has also offered numerous specific allegations of Ben Lomand's misappropriation of its property. In response Ben Lomand states only that the photographs offered in support of those allegations are not labeled and are not clear or distinct enough to allow Ben Lomand to

⁵⁶ *Answer*, p. 7 (June 11, 2003)

fully answer Frontier's allegations.⁵⁷ Labels notwithstanding, Frontier has clearly articulated that the photographs attached to its *Responses* purportedly show that Ben Lomand has misappropriated Frontier's property. Based on the foregoing, the Hearing Officer finds that Frontier has provided sufficient facts in its *Complaint* and *Responses* to support the allegations contained therein.

C. Whether Frontier has standing to prosecute its *Complaint* regarding allegations that Ben Lomand has violated Authority rules for the filing of tariffs.

Ben Lomand has stated that Tenn. Code Ann. § 65-4-120 does not contemplate a private cause of action.⁵⁸ The Hearing Officer need not reach the issue of whether Tenn. Code Ann. § 65-4-120 contemplates a private cause of action because Frontier does not rely on Tenn. Code Ann. § 65-4-120 to establish the basis for its claims for relief. For example, Frontier alleges that Ben Lomand has used the promotional material of its parent organization and offered the promotions contained in that material, in violation of applicable tariffing requirements.⁵⁹ Ben Lomand offers no specific response to the allegation that promotions offered by its parent corporation, Ben Lomand Telephone Co-Op, Inc., were in fact offered by Ben Lomand employees but states only that most of the promotional material pointed to by Frontier does not refer to Ben Lomand. Frontier does not dispute that most of the advertisements are advertisements of Ben Lomand's parent corporation. However, Frontier does allege that Ben Lomand is using these advertisements to market and offer promotions that have not been properly tariffed.⁶⁰ Frontier also states that this practice has placed Frontier at a competitive disadvantage because of a lack of notice required by Authority rules that Ben Lomand would

⁵⁷ *Motion to Dismiss*, p. 4 (September 4, 2003)

⁵⁸ *Id.* at 3

⁵⁹ *Complaint*, p. 4 (May 9, 2003) See also *Response to Amended Motion to Dismiss*, p. 4 (September 5, 2003).

⁶⁰ *Responses*, p. 2 (July 14, 2003).

offer such promotions.⁶¹ Frontier has alleged a distinct and palpable injury in the form of an alleged lack of notice of special promotions, an alleged loss of customers to anti-competitive conduct, and alleged misappropriation of its property. Frontier has alleged that these injuries were caused by Ben Lomand's failure to file informational tariffs and by Ben Lomand's misuse of Frontier's property. Regardless of whether Tenn. Code Ann. § 65-4-120 establishes a private cause of action, it does provide the Authority the power to redress violations of rules or requirements of the Authority.⁶²

V. Conclusion

For the foregoing reasons, the Hearing Officer denies the *Motion to Dismiss*.

IT IS THEREFORE ORDERED THAT:

The motion to dismiss contained in the *Amended Answer and Motion to Dismiss of Ben Lomand Communications, Inc.* is denied.



RANDAL L. GILLIAM
HEARING OFFICER

⁶¹ *Responses*, p 2 (July 14, 2003).

⁶² Tenn. Code Ann § 65-4-120 states "Any public utility which violates any . rule, or requirement of the authority, shall in the discretion of the authority be subject to a penalty of fifty dollars (\$50.00) for each day of any such violation or failure "